Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor

HIGH COURT (KUALA LUMPUR) — JUDICIAL SEPARATION PETITION NO S4–33–50 OF 2000 AND DIVORCE PETITON NO S4–33–193 OF 2001
FAIZA TAMBY CHIK J
3 NOVEMBER 2004

Family Law — Divorce — Damages against co-respondent — Failure to make co-respondent party to proceedings — Whether claim for damages must fail — Whether claim against corespondent could be made in petition for judicial separation — Law Reform (Marriage and Divorce) Act 1979 s 58

Family Law — Financial obligation — Maintenance — Divorce proceedings — Parties close to retirement — Children above 18 years old — Husband undertook to pay for children's education — Whether wife and children should be given maintenance

Family Law — Matrimonial property — Division of property — Equal division — Whether assets must be divided equally although parties did not contribute equally towards acquisition of assets — Law Reform (Marriage and Divorce) Act 1979 s 76(1)

The parties were married in 1977 and had two grown up children. The wife ('the respondent') was a teacher and had left the shared residence on 21September 1990. The petitioner/husband petitioned for the divorce of the marriage and the respondent filed for the judicial separation of the parties. Inher petition for judicial separation, the respondent had alleged adultery of the petitioner and claimed damages against the adulterer but did not cite the adulterer as a co-respondent. The petitioner and the co-respondent vehemently denied the allegation of adultery. The respondent also claimed shares in the various assets of the respondent and maintenance for herself and the children.

Held, granting decree nisi to be made absolute immediately and no orders for maintenance for the respondent or for division of matrimonial assets:

(1) By failing to plead properly and to make the co-respondent a party to the divorce proceedings, the respondent had in fact shut herself out from seeking relief under s 54(1)(a) and s 58 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). Indeed, her prayer in para (5) of her answer to the divorce petition, that the party cited be ordered to pay damages had no foundation, as no party had been cited. Therefore, her claim for damages must fail. Also s 58 of the LRA does not provide for damages when the relief sought is judicial separation only, and not divorce. The respondent could not therefore claim damages against the 'party-cited' in the petition for judicial separation. In any event, her evidence fell far short of proof of adultery, and did not even show improper association. The standard of proof for adultery is 'beyond reasonable doubt' (see para 3).

(2) There was no doubt that there was much unhappiness and in fact physical confrontations between the parties. In view of the protracted separation of 11½ years before the filing of the petition, it cannot be denied that this marriage had irretrievably broken down, on the ground of their having lived apart for such a long time (see para 7).

(3) The children were 24½ and 22½ years of age. The petitioner had met all the financial needs of the children for their tertiary education, and continued to do so. Since there is no legal duty on a parent to support children beyond the age of 18 the court shall make no order as to maintenance for the children although the petitioner had solemnly undertaken to see the children through to the completion of their tertiary education (see para 8). As both parties were close to retirement age and had the capacity to earn enough for their needs, there should be no order for maintenance (see para 9).

(4) Section 76(4) of the LRA states that the party by whose effort the assets were acquired shall receive a greater proportion. Equality of division is therefore not the intent and purpose of s 76(3). Equality is provided in s 76(1), where there is a direct contribution by the other spouse. Where only s 76(4) applies, the division cannot be equal. In the nature of things, the respondent could not have made any direct contribution for the past 14 years, and therefore clearly only s 76(3) could apply in this case. Since the respondent had the best of the three properties, and the petitioner had single-handedly met all the financial needs of the tertiary education of his children, there should not be any further order for division of assets. The justice of the case demands that the petitioner should (according to s 76(4)) receive a greater proportion of the remaining assets, and the fairest order in this case would be no order at all (for division of matrimonial assets) (see para 23).

[**Bahasa Malaysia translation**

Pihak-pihak telah berkahwin pada tahun 1977 dan mempunyai dua orang anak yang telah dewasa. Si isteri ('responden') adalah seorang guru dan telah meninggalkan rumah kediaman bersama pada 21 September 1990. Pempetisyen/suami memfailkan petisyen untuk perceraian dan responden memfailkan permohonan untuk pemisahan kehakiman. Di dalam petisyen responden untuk pemisahan kehakiman, responden mendakwa pempetisyen telah melakukan perzinaan dan menuntut gantirugi dari si penzina tetapi tidak menamakan sipenzina sebagai responden bersama. Pempetisyen dan responden bersama dengan bersungguh-sungguhnya menafikan dakwaan perzinaan tersebut. Responden juga menuntut bahagian-bahagian di dalam berbagai aset responden dan nafkah untuk dirinya dan anak-anak.

Diputuskan, dekri nisi dijadikan mutlak serta-merta dan tiada perintah untuk nafkah terhadap responden atau pembahagian aset suami-isteri:

(1) Oleh kerana responden telah gagal memplid dan menjadikan responden bersama sebagai satu pihak di dalam prosiding perceraian, beliau telah menafikan hak untuk menuntut relif di bawah s 54(1)(a) dan s 58 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu'). Maka, tuntutan beliau di perenggan (5) di dalam jawapannya kepada petisyen perceraian, bahawa pihak yang disebut diperintah untuk membayar gantirugi adalah tidak berasas, kerana tiada pihak yang disebut. Oleh yang demikian, tuntutan beliau untuk gantirugi mesti gagal. Juga, s 58 Akta itu tidak memperuntukkan gantirugi apabila relif yang dipohon hanya pemisahan kehakiman dan bukan perceraian. Responden dari itu tidak dapat menuntut gantirugi terhadap 'pihak yang disebut' di dalam petisyen untuk pemisahan kehakiman. Dalam apa-apa keadaan pun, keterangan beliau tidak dapat membuktikan perzinaan, malah gagal menunjukkan pergaulan yang tidak patut. Tahap bukti untuk perzinaan adalah 'tanpa keraguan munasabah' (lihat perenggan 3).

(2) Tiada kesangsian bahawa terdapat ketidakbahagiaan dan konfrontasi fizikal di antara pihak-pihak. Memandangkan pihak-pihak telah tinggal berasingan selama 11½ tahun sebelum memfailkan petisyen, ianya tidak dapat dinafikan yang perkahwinan ini telah gagal atas alasan mereka telah tinggal secara berasingan untuk masa yang sangat panjang (lihat perenggan 7).

(3) Anak-anak telah berumur 24½ dan 22½ tahun. Pempetisyen telah memenuhi kesemua keperluan kewangan anak-anaknya untuk pelajaran tinggi, dan masih terus berbuat demikian. Oleh kerana tiada tanggungjawab undang-undang ke atas seorang ibu-bapa untuk menanggung anaknya selepas usia 18 tahun, mahkamah tidak akan membuat sebarang perintah berhubung dengan nafkah untuk anak-anaknya walaupun pempetisyen telah memberi akujanji untuk menanggung anak-anaknya sehingga mereka tamat pengajian tinggi mereka (lihat perenggan 8). Memandangkan kedua-dua pihak sudah hampir dengan persaraan dan mempunyai kemampuan untuk menyara diri sendiri, perintah untuk nafkah adalah tidak wajar (lihat perenggan 9).

(4) Seksyen 76(4) Akta itu menyatakan bahawa pihak yang berusaha untuk mendapat aset akan mendapat bahagian yang lebih besar. Oleh yang demikian, pembahagian yang sama rata bukanlah niat dan tujuan s 76(3). Pembahagian sama rata diperuntukkan di bawah s 76(1), di mana terdapat sumbangan terus oleh pasangan. Di mana hanya s 76(4) terpakai, pembahagian tidak boleh sama rata. Dalam keadaan ini, responden tidak mungkin membuat sebarang sumbangan terus dalam masa 14 tahun yang lepas, dan dari itu jelas sekali yang hanya s 76(3) terpakai di dalam kes ini. Oleh kerana responden telah memperolehi tiga hartanah yang

terbaik, dan pempetisyen telah memenuhi kesemua keperluan kewangan pengajian tinggi anak-anaknya, tidak perlu ada perintah lanjut berhubung dengan pembahagian aset-aset. Keadilan kes menuntut pempetisyen wajar, (menurut s 76(4)), menerima bahagian yang lebih besar dalam aset-aset selebihnya, dan perintah yang paling adil dalam kes ini ialah tiada sebarang perintah langsung (berhubung dengan aset-aset suami-isteri) (lihat perenggan perenggan 23).]

Notes

For a cases on damages against co-respondent, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2795.
For cases on division of property, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3322–3413.
For cases on maintenance, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2550–2553.
For division of matrimonial property, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [140.395]–[140.397].

Cases referred to

Karunairajah v Unithambigai [2004] 2 MLJ 401 (refd)
Koh Teng Lam v Elsie Koh Chen Chee [1976] 1 MLJ 103 (refd)
Lim Yun Yin v Gan Kim Biow & Ors [1982] 2 MLJ 68 (refd)
Shanmugam v Pitchamany & Anor [1976] 2 MLJ 222 (refd)
Sivanes v Usha Rani [2002] 3 MLJ 73 (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 r 11
Law Reform (Marriage & Divorce) Act 1976 ss 54(1)(a), 58, 76(1), (2), (3), (4)

Balwant Singh (Balwant Singh Sidhu & Co) for the petitioner/husband.
V Alahakone (Azlin, Alahakone & Associates) for the respondent/wife.

Faiza Thamby Chik J:

[1] The parties were married on 2 July 1977, and cohabited at the petitioner's family home at 151, Jalan Krian, Taman Rainbow, Batu 4, Jalan Ipoh, Kuala Lumpur. There are two children of the marriage: Puneet Nandrajog a/l Shudesh Kumar (born on 14 November 1979 and now 24½); and Caithrie Devi Nandrajog a/p Shudesh Kumar (born on 26 January 1982 and now 22½). The wife/respondent had left the shared residence on 21 September 1990. She had obtained an order for custody of the children on 16 September 1991, in originating summons No S5–24–1287 of 1990. She had then proceeded to file an application for maintenance for herself and the children vide Kuala Lumpur magistrate's court maintenance application No 91–13 of 1991. The

consent order is dated 30 December 1991 and ordered the petitioner/husband to pay the respondent/wife a monthly sum of RM1,200 as maintenance for her and the two children of the marriage. Since, then the parties had not resumed cohabitation. The respondent/wife made an application on 5 January 2001 to vary that order, and that application resulted in the court ordering the petitioner/husband to pay the same sum of RM1,200 per month, and continue paying for the education expenses for the children. That order was made on 11 January 2002. By the time the petition was filed, they had lived apart for 11½ years; it is now close to 14 years.

[2] The petitioner/husband contends that the marriage broke down because of the unreasonable behaviour of the respondent/wife. The particulars are set out in para 11 of the petition. The petitioner contends that the respondent/wife is a suspicious person, and had even physically attacked him. He says she was abusive and rude, even to his father. She wanted the petitioner to move out of his family's residence, which he refused to do so, and this led to frequent quarrels between the parties, eventually leading to their separation. The petitioner also states that the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (in fact a period of 11½ years, since the respondent/wife left the shared residence in 1990). The fact of separation is not denied by the respondent/wife. It is therefore open to this court to grant the decree nisi on that ground alone.

[3] The respondent/wife herein had, in her petition for judicial separation No S4–33–50 of 2000 alleged in para 10 of the petitioner/husband herein had behaved in such a way that she could not reasonably be expected to live with him. In para 11 of the same petition she had also alleged adultery with the co-respondent. In the 'particulars' in para 12 she merely alleged that the petitioner/husband herein and the co-respondent had a 'relationship' without giving detailed particulars. Her evidence in court showed that her allegations were based purely on suspicions and perhaps, possessiveness. In the petition for divorce No S4–33–193 of 2001, the wife/petitioner had filed an answer. While she alleged adultery in para 4, she had not made the alleged adulteress a party or claimed damages, in breach of s 58 of the Law Reform (Marriage & Divorce) Act 1976 (the Act), and r 11 of the Divorce and Matrimonial Proceedings Rules 1980. Indeed, she had not even alleged that she found it 'intolerable' to live with the petitioner herein, in consequence of the alleged adultery. She has therefore fallen short of the pleading required under s54(1)(a) of the Act, insofar as the divorce proceedings are concerned. Byfailing to plead properly and by failing to make the co-respondent a party to the divorce proceedings, the respondent/wife has in fact shut herself out from seeking relief under s 54(1)(a) and s 58 of the Act. Indeed, her prayer in para (5) of her answer to the divorce petition, that the party cited be ordered to pay damages has no foundation, as no party has been cited. This also means that her claim for damages must fail. In the trial, the co-respondent in

the judicial separation proceedings had been referred to throughout as the 'co-respondent' for convenience. However, it should be noted that:

(i) The respondent/wife herein had claimed damages against the 'party-cited' in the petition for judicial separation although s 58 of the Act only provides for such damages to be ordered 'on a petition for divorce…'. It does not provide for damages when the relief sought is judicial separation only, and not divorce;

(ii) The respondent/wife cannot therefore claim damages against the 'party-cited' in the petition for judicial separation, for the reasons given in (1) above. She also cannot claim damages in the divorce proceedings as she had not brought in the alleged adulteress as a party. Her allegations of adultery have therefore not been properly pleaded, and must therefore fail.

[4] In any event, her evidence falls far short of proof of adultery, and does not even show improper association. The petitioner and the co-respondent vehemently deny the allegation of adultery.

[5] The respondent relies on some photographs taken on the birthday of the co-respondent, where the co-respondent and the petitioner are shown cutting a birthday cake together. (The evidence at the trial showed that this cutting of a birthday cake was a usual practice for all the staff, at the petitioner's clinics). The respondent also relied on the petitioner having been seen at the 'Blue Moon' lounge at the Equatorial Hotel, with the co-respondent. There was no allegation that they were even holdings hands but that they were seated together on the same settee close to each other. The atmosphere at the Blue Moon Lounge is obviously 'cosy' but does not mean that they were sitting together in such a manner as to suggest an intimate relationship? There is certainly no evidence of that. It is in evidence that the 'Blue Moon' lounge is a very public place on the ground floor and in the lobby area of the Equatorial Hotel. It is noted that on that one 'incident' the brother of the respondent/wife, Mukesh Kapoor claimed the petitioner had been 'unfaithful' but it must be stressed here that he could not give any credible evidence of improper association. Unlike other cases where adultery is cited, here there is no evidence at all of any documents such as letters, or cards where the petitioner had even used any words of endearment towards the co-respondent. Nor did the respondent/wife and her witnesses give any evidence of any endearing words ever having been exchanged between the petitioner and the co-respondent. Indeed, there is no evidence of any improper association, much less of an adulterous union. There is not even any evidence of inclination, as the petitioner seems to have treated the co-respondent no better than he treated his other staff. He had cakes cut on all their birthdays, as evidenced by photographs. Indeed, the evidence shows that she earns only RM720 per month, which is hardly a princely sum for so many years of service. Nor has there been any suggestion or evidence that she has ever received preferential treatment from

the petitioner/husband, which would be expected if she was indeed his paramour. Not even one witness has been able to say that he or she saw the parties holding hands, much less kissing or engaging in any other objectionable act. The respondent/wife has therefore failed to make out a case of adultery. The standard of proof for adultery is 'beyond reasonable doubt'.

[6] In *Koh Teng Lam v Elsie Koh Chen Chee* [1976] 1 MLJ 103 the court was not prepared to make a finding of adultery although there was evidence that the parties had been found in a locked class-room at least once. In *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222, the court was prepared to hold that adultery had been committed, but there the co-respondent was found in a state of undress, and the respondent's panties were found on the floor in the kitchen. In *Lim Yun Yin v Gan Kim Biow & Ors* [1982] 2 MLJ 68, the court held that the petitioner had failed to prove adultery although the co-respondent had been seen in the husband's room at the doctors' quarters on two occasions, one one occasion even lying on his bed in ordinary dress.

[7] In our case, it is indeed strange that there is absolutely no evidence of any such intimacy, and the evidence of 'adultery' falls far short of the standard required, and does not even amount to evidence of any improper association. The respondent's allegation of adultery is woefully inadequate and does not even prove her case on a balance of probabilities, let alone beyond reasonable doubt. However, there is no doubt that there was much unhappiness and in fact physical confrontations between the parties, with the respondent/wife even alleging assault with an iron bar which the petitioner/husband denied. Nevertheless, there were altercations between the parties and physical attacks where the petitioner/husband says he acted in self-defence. Finally, in view of the protracted separation of 11½ years before the filing of the petition, itcannot be denied that this marriage has irretrievably broken down, on the ground of their having lived apart for such a long time.

[8] The children are now 24½ and 22½ years of age. It is in evidence that the petitioner had met all the financial needs of the children for their tertiary education, and continues to do so. This despite the decision of the Federal Court of 9 April 2004, that there is no legal duty on a parent to support children beyond the age of 18 (see *Karunairajah v Unithambigai* [2004] 2 MLJ 401 (FC)). Nevertheless, in the light of that decision I shall make no order as to maintenance for the children although the petitioner/husband solemnly undertakes to see the children through to the completion of their tertiary education.

[9] It is in evidence that the petitioner had faithfully complied with the order for maintenance dated 30 December 1991. It is also in evidence that the petitioner/husband even helped the respondent/wife purchase a residence, instead of her having to pay rental. The petitioner/husband is two years older than the respondent/wife. She is 56 and he is 58. The respondent/wife is a graduate teacher, earning more than RM3,000 per month and is pensionable.

Even after retirement, she certainly has an earning capacity (perhaps by giving home tuition or teaching at private institutions, as most retired teachers do). She will be entitled to gratuity. She will also receive medical benefits. Indeed, it is the petitioner who has cause for concern, as he is already 58, and with each passing year there is every possibility that he may no longer be able to carry on as a dentist, unlike the respondent/wife, for whom age should be no barrier. It is common knowledge that the work of a dentist requires steady hands, and the passing years will no doubt render the petitioner unable to earn his living as a dentist. I am of the view that the respondent/wife, on the other hand will continue to be much in demand (as retired teachers are) and may well be able to earn more by giving private tuition than she has earned as a regular employee. I think when the children's tertiary education is completed and the petitioner/husband is free of that obligation, the circumstances should again be looked at. The respondent/wife will have to show what effort she has made for her own financial upkeep. She is not in the position of a wife who has been a housewife for many years, and cannot be re-trained to enter the employment market. She is a trained and very experienced teacher, and it cannot be said that she does have an earning capacity. If her answer is that she would like to enjoy her retirement, so would the petitioner/husband, as he is older, being 58 years of age. It is my opinion that as both the parties are close to retirement age and yet have the capacity to earn enough for their needs, that there should be no order for maintenance.

THE RESIDENCE KNOWN AS NO 151, JALAN KRIAN, TAMAN RAINBOW, JALAN IPOH, KUALA LUMPUR

[10] The petitioner/husband purchased this residence in 1976, before the parties married. By the time the parties married, this residence was the family home, housing the petitioner/husband's parents, brothers and sisters as well, although it is only a double-storey link house. The petitioner/husband's siblings eventually left that residence; the petitioner/husband's father passed away, leaving only the petitioner/husband and his aged mother, who also continues to reside there. There was no direct contribution by the respondent/wife towards the acquisition of this property. Her salary in the beginning was in the region of RM800 per month and her needs were RM750. How could she have contributed RM400 per month for any length of time? In fact the evidence shows that the parents of the petitioner/husband and other family members also helped look after the home and family. This is therefore not the usual case of a husband and wife living in a shared residence which became the 'matrimonial home' in law. This shared residence was the family home of the petitioner/husband's family and the considerations are entirely different. The petitioner/husband's evidence is that this property is worth about RM250,000. It was paid for entirely by him, and there was no direct contribution by the respondent. Her indirect contribution (as wife and mother) between 1978 and 1990 (when she left with the children) was for half the length of the marriage.

In any event, there is no evidence of her looking after that home (since it was a family home of the petitioner/husband's parents and siblings as well) and it can be expected that the home would be looked after by the whole extended family. It cannot be denied however that she did, during the marriage look after the children, until they left for their studies overseas. In para 4 of his affidavit of means, the petitioner/husband states that he had purchased this property on 3 July 1976 for RM59,000. He borrowed RM2,000 from his uncle, and had taken a bank loan for the balance of RM39,000. He says both loans were repaid by his family members, and that it was a family home, looked after by his family.

A DOUBLE-STOREY LINK HOUSE KNOWN AS NO 7, JALAN 10/6A, SECTION 10, JALAN GASING, PETALING JAYA

[11] The petitioner/husband says that this property was purchased in 1995 in the respondent/wife's name for RM193,000. The petitioner/husband paid the downpayment of RM15,000 and also paid RM43,000 to the vendor in cash (in addition to the sale price). He also paid the second payment of RM15,000 thus making a total RM73,000. In addition to this he paid the legal fees, paid for painting and repair works, and for replacement of the water tank. His direct contribution towards the acquisition and repair of this property is therefore substantial, amounting to about 40% of the total cost of acquisition and repairs. The petitioner/husband says the market value of this property is about RM350,000. Even if we deduct the outstanding bank loan (which may be about RM80,000 now) the net residual value of the property is still at least RM270,000. The petitioner/husband had made a direct contribution towards its acquisition and is entitled to claim a half share by invoking s 76(1) and (2) of the Act although he is prepared to make no such claim if the respondent/wife does not make any claim on his assets.

SINGLE STOREY LINK HOUSE KNOWN AS NO 2, JALAN 10/6, SECTION 10, PETALING JAYA

[12] The petitioner/husband had purchased this property for RM160,000 on 27 October 1997, some seven years after the respondent had left him. There was therefore no contribution by her towards the acquisition of this property. The market value is about RM180,000. Although the petitioner/husband does receive rental income of RM800 per month, obviously he has to pay for upkeep of the property and quit rent and assessment and other taxes.

MERCEDEZ 230E (1992 MODEL) REGISTRATION NO WEA 5759

[13] The petitioner/husband had purchased this car in July 1995 for RM170,000 and he paid the full purchase price himself. At the time he affirmed the affidavit in November 2002, he estimated the value to be about RM75,000. It would be substantially less now, because of depreciation and

the fall in prices of such cars. A fair estimate of present value would be perhaps RM55,000. It is observed that the petitioner/husband's car is 12 years old. The respondent/wife's car is 10 years old. The parties seem to be on par.

A TOYOTA 1.6 REGISTRATION NO WEB 4123

[14] The petitioner-husband had purchased this car for RM80,000 on 1October 1997. He says the respondent did not contribute to the purchase of this vehicle either. He estimated the value (as at November 2002) as about RM60,000. It can safely be said that the present value cannot be more than RM45,000. His son Puneet is using the car and the petitioner/husband has no objections to maintaining the status quo. It is observed that the petitioner/husband pays for the upkeep of this car.

THE CLINICS

[15] The petitioner/husband estimates that the Setapak Dental Surgery has assets worth only about RM15,000; the Loh Dental Surgery has assets worth about RM10,000; his share of the assets of Klinik Pergigian Sri Sinar are worth only about RM6,500. The total for these three clinics is therefore RM31,500 only. The clinics occupy rented premises and have no other value other than the fixed assets therein. Because the clinics are occupying rented premises, all the petitioner/husband owns is the goodwill. At his age, that too may be diminishing.

THE BANK ACCOUNTS

[16] In his affidavit of means (bundle K) the petitioner had set out the balances then available in his bank accounts (including monies he had set aside for the education of his children) as follows:

(a) Standard Chartered Bank: RM13,003.44
(b) RHB: RM1,742.23
(c) RHB: RM385.78
(d) Maybank (Savings): RM2,877.17
(e) Maybank (Premiums): RM63,052.14
(f) Maybank (Clinic a/c): RM6,932.64
(g) Public Finance (Clinic a/c): RM8,408.84
Total: RM96,402.24

[17] He also still had the following monies in trust for the son's education:

(a) Standard Chartered Bank: RM30,000
(b) Standard Chartered Bank: RM90,000
(c) Standard Chartered Bank: RM40,000
(d) RHB: RM25,505.84
Total: RM185,505.84

[18] He had also opened savings account for his daughter, and he held a total of RM139,312.09 in the two accounts (exhs SK 19 and SK 20). All these sums totalled RM421,219.93. The petitioner/husband has RM150,000 left in his bank accounts for the children's needs (and not RM324,817.49 as claimed by the respondent/wife). It is offensive to suggest that this sum be transferred to the respondent/wife, in the light of the Federal Court decision referred to earlier. The petitioner/husband has continued to maintain the children even after the Federal Court decision of 9 April 2004, and should be allowed to continue to do so. If that money is to be divided between the parties, then both parties should meet the children's needs, in the same proportion as the division, but no order can be made to that effect (ie for the support of the adult children).

EPF

[19] As at 21 November 2002, the petitioner/husband had RM226,019.01 in his EPF account. It cannot be denied that both the petitioner/husband's EPF balance and the respondent/wife's gratuity are matrimonial assets. However, both attract the operation of ss 76(3) and (4) of the Act, and the party who acquired the asset should receive a major share. Indeed, in none of the decided cases except one, did the court order equal division of the EPF balance of the spouses. The total of the EPF and the gratutity adds up to RM306,000. If the acquirer in each case retains 80% of the balance (with 20% to the other party) the petitioner/husband would end up with RM196,000 (RM180,000 + RM16,000) and the respondent/wife with RM110,000 (RM46,000 + RM64,000). The petitioner/husband may then have to pay the respondent-wife a sum of RM30,000 as her share, after the said division (RM226,000 less RM196,000). I think that such an apportionment would not be unreasonable, and would set the parties on an equal footing in respect of division of matrimonial assets, if no other order is made.

MOTIRAM & SONS

[20] It is in evidence that the shareholders were the petitioner/husband, his late father, and his brothers. The proceeds of sale of assets had been distributed and the petitioner/husband had used most of his share for the children's education. The petitioner/husband was not cross-examined on the withdrawals referred to. Had he been cross-examined, it could have been determined whether the withdrawals were used to pay creditors, family and children's expenses and other expenses (including legal fees). In the absence of cross-examination, no submission should be made as it would be mere speculation. The respondent/wife made various references to withdrawals. Again, in the absence of cross-examination, it is speculative to submit on the reasons for the withdrawals. It is in evidence that the company had bought a bungalow in Petaling Jaya; down-payment and agency fees would have been paid; directors

fees and share of profits would have been distributed; the son's education expenses were met; the late father's share was paid to the mother; and monies were expended on the children's upkeep, education and maintenance. The resolutions of the company were tendered as evidence, and these speak for themselves. There is no evidence of any money in the company's accounts. The withdrawal of RM600,000 is shown in resolution ('SK–12') in bundle L. The RM380,000 is part of the monies held on trust for the children and monies paid to the petitioner's mother (RM130,000) which was the father's share. As for the withdrawals of RM193,419.64 from the clinics' accounts since the year 2000, the submission for the respondent/wife overlooks the fact that salaries have to be paid; rentals have to be paid; and medical supplies purchased. The petitioner/husband should have been cross-examined on these withdrawals instead of speculations being made in the submission.

[21] The respondent/wife made a reference to an offer by the petitioner/husband to pay her RM350,000. The petitioner/husband denied making any such offer. Even when negotiations were carried out earlier, the respondent/wife wanted money to support the children through their tertiary education. That is now history, as the petitioner/husband has met those expenses directly himself, using the monies he had saved for them. The law is clear, the court may only divide what is available now, and not what was available when the respondent/wife filed her claim or earlier, for then the children's tertiary expenses had not yet been met by the petitioner/husband. As the Court of Appeal said in *Sivanes v Usha Rani* [2002] 3 MLJ 73, a marriage is a partnership, but it is not a business, and no accounting between the parties may be expected. The jurisdiction and power of the court is only to divide what is left of matrimonial assets at the time the order is made.

[22] In his evidence-in-chief the petitioner/husband gave evidence that (Q17) he had already spent about RM350,000 on his children's education from the year 2000 onwards and expected to spend another RM250,000 on their education by the time they graduate. He gave details of the expenses and referred to supporting documents in bundle A (for the son) and bundle B (for the daughter). He gave evidence that after spending large sums on his children's education, he still had about RM40,000 (at that time) for the education, and RM94,746.17 savings for himself, apart from his EPF balance; not including the RM25,000 he had given the respondent/wife five years earlier to buy Wawasan 2020 shares. In his further examination-in-chief, he gave evidence that he had spent a further RM92,118.28 on the children for the period between March 2003 to November 2003, and was continuing to meet all their financial needs. He had by then spent about RM532,811.28 on their tertiary education, and continued to spend about RM4,000 per month on them and also pay other expenses such as airline tickets for his son. What matters for the present purpose is — what matrimonial assets remain at this time, in respect of which an order for division may be made under s 76 of the Act? These are:

Net value (approx)

The residence known as
No 151, Jalan Krian, Taman Rainbow
Jalan Ipoh, Kuala Lumpur … RM250,000

The residence known as
No 7, Jalan 10/6A,
Jalan Gasing, Petaling Jaya … RM270,000

The property known as
No 2, Jalan 10/6, Petaling Jaya … RM180,000

[23] The total value of these three items of landed property is RM700,000. The respondent/wife resides in the most valuable of these three properties which is worth about RM350,000 (net about RM270,000 after taking into account the outstanding loan) while the two properties (one bought before the marriage and which is the family home of the petitioner/husband's family) total about RM430,000 in value. In view of the fact that the parties have lived apart for some 14 years now, during which time the petitioner has spent hundreds of thousands of ringgit for his children's education, I am of the opinion that there should be no order in respect of these three assets, as the present de facto distribution is more than fair to the respondent/wife, since the petitioner/husband had contributed a substantial sum for the acquisition of the property she now owns and resides in. Similarly, the other non-landed assets should be left as they are; the petitioner/husband needs to carry on the business of his clinics to complete his commitment to the education of his children, and in any event the value of the assets of the clinics is negligible, and he would need his EPF for his retirement. The respondent/wife has her gratuity and her pension. As the petitioner has very honourably continued to meet all the expenses for the tertiary education of his children (despite the Federal Court decision of 9 April 2004 that a parent is not under a legal duty to maintain his children beyond the age of 18) and intends to continue to do so, no order should be made on division of assets as it is apparent from his evidence that all the monies he had set aside for his children's education has in fact mostly been spent and exhausted for that purpose, and there is hardly anything left. Fortunately the son has completed his education, and the daughter will be completing hers soon. The court's duty is to divide assets available at the time of divorce. (See *Sivanes v Usha Rani* [2002] 3 MLJ 73 (CA).) Section 76(3) speaks of looking after the home and family. Here the family unit broke up about 14 years ago, into two family units. The respondent/wife continued, no doubt to look after the children until the son left for India a few years ago to study medicine, and then continued in the Malacca Manipal College. The respondent/wife had only the daughter to look after for some years now, and even the daughter is already 22½ years of age. The petitioner/

husband continued to work very hard to save for his children's education, and to his credit, his son will soon be as a full-fleged medical doctor, while the daughter has completed her law degree and will no doubt complete her CLP by July 2005 and become a member of the Bar. The evidence shows that the petitioner/husband rarely indulged himself, not even going for holidays, but has fulfilled not only his legal but thereafter even moral obligations to his children. In fact, the son even has the use of a car provided by the petitioner/husband. Section 76(4) states that the party by whose effort the assets were acquired shall receive a greater proportion. Equality of division is therefore not the intent and purpose of our s 76(3). Equality is provided in s 76(1), where there is a direct contribution by the other spouse. Where only s 76(4) applies, the division cannot be equal. In the nature of things, the respondent/wife could not have made any direct contribution for the past 14 years, and therefore clearly only s 76(3) can apply in this case. When we consider that the respondent/wife has the best of the three properties, and the petitioner/husband has single-handedly met all the financial needs of the tertiary education of his children — there surely should not be any further order for division of assets. The petitioner/husband has spent practically all his life savings on the children's education, and is left with only the house that he shares with his mother, another inexpensive property which earns him rental of about RM750 per month, and his EPF balance. Surely the justice of the case demands that he should, (according to s 76(4)) receive a greater proportion of the remaining assets, and the fairest order in this case I think would be no order at all (for division of matrimonial assets). The respondent/wife has a comfortable residence to live in, gratuity (of about RM80,000), a pension (of about RM1,700 per month), medical benefits, saving of about RM30,000 and the dividends from the Wawasan 2000 funds of RM25,000 that she continues to control, and a capacity to continuing to earn her keep. In fact, in cross-examination the respondent/wife had admitted that when she filed the judicial separation proceedings, he had harboured a fear that the petitioner/husband may abandon his children and refuse to pay for their tertiary education, and that her fears had been proven unfounded, in the light of subsequent developments, and the evidence led at the trial in these proceedings. In the circumstances I make the following orders:

(1) That the marriage be dissolved and the decree nisi is made absolute immediately;

(2) That there be no orders for maintenance for the respondent/wife, or for division of matrimonial assets, and that the status quo is hereby ordered to be maintained;

(3) That there be no order as to costs;

(4) That there be no order for damages against the co-respondent as adultery has not been proven;

(5) That the petitioner/husband is hereby ordered to pay the balance of the respondent/wife's property in full known as No 7, Jalan 106A, Section 10, Jalan Gasing, Petaling Jaya as full and final settlement of all her claims to a share of the matrimonial assets.

Petition for divorce allowed.

Reported by Loo Lai Mee